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Unto the Right Honourable, The Lords of His Majesty's Privy Council.

The Petition of the Earl of SEAFORTH

Sheweth,

That where your Lordships have been pleased to find the *Deforcement* and *Riot* Lybelled at the Instance of *Pitliver* and *Tulloch* proven; and have decerned me, as I am informed, in a *very great Sum*. I do with all respect to your Lordships, beseech the following Reasons may be considered, for clearing that I cannot be liable on either of these Accompts.

And First, as to the *Deforcement*, I do with submission contend there was none: For there can be no *Deforcement*, where there is no *Messenger*: And *Robert Dallas* alledged to have been *Deforced*, was no *Messenger*. And I did produce an *Attestation* from the *Lyon*, for clearing that he was *deprived*; and his deprivation Intimat but a few Weeks before his pretended *Deforcement*.

I know it was urged, 1mo. That he was *Habite and Repute* Messenger. 2do. That he was deprived only upon a *Formality* by the *Lyon*, and for no ground of *Malversation*. But to these my Answers are plain. And to the First, it is Answered, that the deprivation, being within a few Weeks before the pretended Act of *Deforcement*, and the Deprivation happening to have been Intimat and published at the *Mercat Cross* of *Inverness*, where the *Deforcement* is alledged to have fallen out, there was not time nor pretence of *Habit and Repute*, which is inferred from length of time, and frequency of Acts. 2do. Tho *Habite and Repute* may serve the turn in Civil actiones; yet it is not sufficient to infer a Crime, or to be regarded, where the Question is to be about *Punishment*, where things are to be *Real* and not *Susposed*. 3tio. I did at the Bar give a new Libel to the Pursuers: And I do positively offer to prove, That *Dallas* his *Deprivation* was publicly known; which excludes all pretence of *Habite and Repute*.

And lastly, the pretence, That he was deprived upon a light occasion. I answer, whatever was the occasion of his Deprivation, he was deprived, & was no *Messenger*: And the *Lyon* Court who gave him his Office and Authority, has solemnly taken it away: And if he had believed himself lesed, he ought to have applyed to the *Lords of Session*: But the truth is, he as *Messenger* having found Caution for his Office, and to perform certain other Duties conform to the Act of Parliament, under Condition to be deprived if he should *Faill*, And having failed he was most justly deprived and his deprivation was fairly intimate by the *Lyon Court*: And therefore he was no *Messenger*; and consequently there could be no *Deforcement*. And the Pursuers are to blame, who used such a *Messenger* after the legal form of Intimation.

Nor is this all, though in my humble Opinion, this is very much. But further, it is evident, That the Execution of *Deforcement* in the essential parts of it, is not proven. And I must Beg leave to say, That however in Civil Cases the Execution of a *Messenger* is *probative*; yet in Cases inferring *punishment*, it is but considered as a *naked assertion*; unless it be attested by the Depositions of the Witnesses, unsuspect: Nor is it sufficient to be Subscribed by the *Messenger* in such Cases; because even his Oath would be refused, in respect of the *Personal Injury* in the *Lybel* done to himself. And so it is, this Instrument is not only not attested; but it is destroyed by the Testimonies. First, because the Testimonies differing from what they have Subscribed under their hand, and each from another, do render both the Execution and themselves suspect: And your Lordships have found it in a Case perfectly paralel to this within this few days, betwixt the Earl of *Tullibardine* and *Balnagoun*. 2do. It was to have been proven the *Blazon* was displayed; that I was Wanded or Apprehended; and that it had been Intimat by whose Authority, and at whose Instance: Seeing it was so insert in the Execution, and that some of these, especially the *Displaying the Blazon*, as the differencing Badge of a *Messenger* from any other Leidge, and so an indispensable solemnity; as *McKenzie* in his *Criminals* pag. 259. And *Stair* in his *Institut*. pag. 725. Num. 14. and 738. N. 7. expressly hold it as a principal. And *Stair* ut supra pag. 730 hold it as a principal that an *Exauctorat Messenger* may be dispised, if he cannot prove that he had *Blazon* displayed yet of this the Witnesses prove nothing. Nay on the contrary, they Depone, they did not see the *Blazon*, They Depone they did not see me touched with the *Wand*



of Peace; & none of them did so much as hear *Pitlivers* Name mentioned. I desire to know if they can produce the Testimony of any *Lawyer*, asserting, that a man without any special Mark or distinction by *Blazon*, or even a Messenger with his *Blazon Displayed*, without so much as a Warrant, or the Parties Name Intimat *verbally*, is a *Legal Execution* of a *Caption*: And without a legal Execution of a *Caption*, there can be no deforcement *3tio*. Though the Instrument bears other Witnesses to have been present, beyond all manner of exception; yet the Pursuers has only adduced *Bayn*, designed *Tullochs* Servants, and a *very Boy*, who did not so much as sign the Execution, untill the Messenger was *Dead*. And I offer to prove, That other of the Witnesses being required to sign the Execution, refused it; because it was *not true*. So that it remains, Here is a Deforcement upon which I am fined in a very great Sum, whereupon my *Escheat* may fall without either Messengers or Execution. And it was no marvell though the Witnesses should Vary a little from themselves and the Execution; because I offer to prove. That the Execution was filled up here in *Edinburgh*, even after the Messenger was *Dead*: And I shall use no other Witnesses then these already cited, or the Pursuers themselves and their Agents: And I do contend, That an Execution so *redargued*, and sent up *blank* is not to be considered as an Execution at all.

I omit to tell your Lordships, I had no *Accession* to the Acts of *Violence* and *Deforcement*, and the Pursuers had only the Confidence to urge the Crime to have been committed chiefly by my *Servants*.

As to the *Riot*, I detest and abhor it: It is neither suitable to the Character I have the Honour to bear, nor to my Breeding nor Temper. It is proven indeed, That Mr. *William Bailly*, and other of the Defenders, were guilty of the *Riot*: But that I had any Accession to it, I desire the Pursuers frankly to say, what part of the Probation clears it. They did libel indeed, That *Tulloch* was carried to my House, to my Clofs, through a Town in Day-light, ignominiously; and there Beat. But they have not one single Testimony to prove it; though the Carrying *Tulloch* thorow the Town in Day-light, might certainly have been proven, if it had been *True*. Nay, I positively offer to prove, That the Castle of *Chanery*, was not the ordinary place of my Residence; and that I was *alibi* all that Day.

The Pursuers had not the Confidence to alledge, I was guilty *directly*. They did indeed pretend to have the Matter cleared by their *own Oath*; which is *New*, in Matters *Criminal*. They did likeways alledge, That I should be liable as an *Highland Chief*. But I humbly presume, your Lordships did not proceed upon that Ground. These consequential Hitts, do infinitely more concern the *Nation*, than *me*: It were above measure hard, that I, or Persons in the like Circumstances, should be exposed for the Riots of their Servants to pay such great Sums, with *Imprisonment*, and other great Damages; especially when these Servants were never required, till they were out of my power, they having gone out of the Kingdom long before, and had no residence on my ground. This is not my Case alone, but is the Case of all Noblemen and Gentlemen in the *Highland* Countries; nay, and I may say, in the *Nation*: For there is a general Clause in the Act of Parliament founded on. But I am perswaded your Lordships could not extend that Matter, tho the Pursuers were forced, through the straitness of their Cause, to urge it.

I am as fully perswaded, That the *Odious Misrepresentations* against me, had no influence in the Decision: And therefore I shall not trouble your Lordships with a long Vindication of my self, as to my General Management and Conduct: I am perfectly satisfied your Lordships will proceed only on Probation, and the State of the Case; as is laid before you.

May it therefore please your Lordships to consider these Principles of Law, and to find there is no Deforcement proven: And that I had no Accession to the Riot committed: And therefore to Assoilzie me, and Liberate me from my Imprisonment.

And your Petitioner shall ever Pray.